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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOHN BIEL, Plaintiff and Appellant, v. CITY OF SANTA MONICA et al., Defendants and Respondents.	B168462 (Super. Ct. No. SC 064724)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa Hart Cole, Judge. Affirmed.

Law Offices of Timothy R. Vrastil and Timothy R. Vrastil for Plaintiff and Appellant.

Marsha Jones Moutrie, City Attorney, Joseph Lawrence, Assistant City Attorney, and Barbara Greenstein, Deputy City Attorney, for Defendants and Respondents.

Plaintiff John Biel appeals the dismissal of his lawsuit against his former employer the City of Santa Monica (the "City") and its Chief of Police, James T. Butts, Jr., following the defendants' successful demurrer based on the statute of limitations. We concur with the trial court, and thus affirm the judgment of dismissal.

FACTS

Plaintiff is a former City police officer now on disability retirement from the police force (the "Department"). Hired in 1987, plaintiff's primary assignment was traffic enforcement.

On August 4, 1997, plaintiff was served with a Notice of Intent to Suspend for 40 hours for unapproved use of overtime. At a *Skelly*[1] hearing on September 2, 1997, Chief Butts offered to reduce the hours of suspension in exchange for plaintiff's waiver of his appeal rights; plaintiff refused and requested "arbitration." The City Personnel Board referred the matter to a hearing officer. After an evidentiary hearing, the hearing officer recommended the reduced penalty of a written warning, and the Personnel Board adopted that recommendation.

On December 23, 1999, Chief Butts issued a Notice of Intent to Terminate, and plaintiff was placed on administrative leave. Plaintiff requested and was granted a *Skelly* hearing. Subsequent to that hearing, Chief Butts issued a Notice of Disposition, in which he found that the allegations of the Notice of Termination were either "not sustained" or "unfounded." Plaintiff was served with the Notice of Disposition on February 17, 2000, and was reinstated.

Plaintiff filed his original complaint on January 9, 2001, which he twice amended. His Second Amended Complaint alleged six causes of action: Retaliation in Violation of Government Code section 3304, subdivision (a) against Butts and the City; Retaliation in Violation of Labor Code section 1102.5 against Butts and the City; Retaliation for

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[1] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

Whistle Blowing against Butts and the City; Intentional and Negligent Infliction of Emotional Distress against Butts and the City; and Negligent Hiring, Supervision and Retention against the City.

The City and Butts demurred. The trial court ruled that the first three causes of action, for retaliation in violation of Government Code section 3304, subdivision (a), Labor Code section 1102.5, and whistle blowing, were barred by their respective statutes of limitations. The trial court also ruled that the sixth cause of action, for negligent hiring, supervision and retention, was not contained in a claim against the City, and thus was barred by the failure to bring a claim before the public entity within the six-month time limitation in Government Code section 945.6. The court thus granted the demurrer as to all causes of action,[2] and dismissed the complaint. Plaintiff timely appealed.

STANDARD OF REVIEW

Our Supreme Court has articulated the standard of review applicable to this appeal as follows: "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42.) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. (See *Hill v. Miller* (1966) 64 Cal.2d 757, 759.) And when it is sustained without leave to amend, we

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[2] With respect to the fourth and fifth causes of action, for intentional and negligent infliction of emotional distress, the court determined that the only available remedy was pursuant to a claim for worker's compensation. Plaintiff does not challenge this ruling on appeal.

decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. (*Kilgore v. Younger* (1982) 30 Cal.3d 770, 781; *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.) The burden of proving such reasonable possibility is squarely on the plaintiff. (*Cooper v. Leslie Salt Co*., *supra*, at p. 636.)" (*Blank v. Kirwin* (1985) 39 Cal.3d 311, 316.)

DISCUSSION

1. *Causes of action for retaliation*

Plaintiff does not contend that the trial court applied the wrong statute of limitations to his retaliation claims, but submits that "the requirement to exhaust his administrative remedies tolls the statutes of limitations as to these three causes of action." However, plaintiff cites no authority in support of his contention, and we therefore need not consider the argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 ["'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration'"].) We nevertheless make the following observations:

Plaintiff's first cause of action is for retaliation in violation of Government Code § 3304, subdivision (a), the Public Safety Officers' Procedural Bill of Rights (the "Act"). (Gov.Code § 3300 et seq.) The Act vests initial jurisdiction of actions alleging a violation of the Public Safety Officer's Procedural Bill of Rights in the Superior Court. (Gov. Code § 3309.5.) The City's Personnel Board has no jurisdiction over such claims. Plaintiff's argument that he was required to exhaust his remedies before the City's Personnel Board, and that that exhaustion requirement tolled the statute of limitations under Government Code section 3300 et seq., is simply wrong.

Next, plaintiff alleges that he made disclosures in 1997 regarding false testimony of then-Lieutenant Smiley during an Internal Affairs interview, and that in February 1999 he complained to Chief Butts and others that then-Lieutenant Sanchez had released his

confidential personnel information without a *Pitchess*[3] hearing, and that Chief Butts retaliated against him for these disclosures in violation of Labor Code section 1102.5.[4] Plaintiff argues that he was pursuing his administrative remedies, and thus the statute of limitations "should" have been tolled as to this claim, because a civil court would have been in excess of its jurisdiction were he to have promptly brought this claim. He thus argues that he was precluded from bringing a civil action until his administrative procedures were exhausted. However, the City's Personnel Commission has no jurisdiction over a claim under Labor Code section 1102.5. Indeed, the Personnel Commission was never presented with, and never considered, plaintiff's Labor Code section 1102.5 claim. Thus, the claim lacks merit.

Plaintiff's third cause of action for whistle blowing, appears to be a common law restatement of the second cause of action. The statute of limitations for a common law claim for whistle blowing, if such a claim exists, would be the catch-all one year limitations period for personal injury contained in former Code of Civil Procedure section 340, subdivision (3). Although the statute of limitations for personal injury has been extended to two years by Code of Civil Procedure section 335.1, effective January 1, 2003, the latter statute is not retroactive. (*Krupnick v. Duke Energy Morro Bay* (2004) 115 Cal.App.4th 1026.)

2. *Cause of action for negligent hiring, supervision, and retention*

Appellant filed a claim against the City, preparatory to filing this lawsuit. In that claim, he alleged facts regarding violation of the Public Safety Officers' Procedural Bill

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[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[4] Labor Code section 1102.5 provides in pertinent part: "(b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

of Rights, wrongful disclosure of his personnel file, retaliation for disclosing untruthful statements of a supervisor, and retaliation by taking away benefits and issuing a Notice of Intent to Terminate. Plaintiff alleged no facts which would support a cause of action for negligent hiring, supervision and retention of Chief Butts.

In his sixth cause of action, plaintiff alleged that the City failed to conduct a proper background and character investigation of Butts, and thereby failed to discover allegations of misconduct. Plaintiff alleges that Butts was complicit in the "misappropriation of funds, false statements and misrepresentations . . . , cover ups of misconduct . . . [and] planting of evidence to obtain criminal convictions . . . ." None of these facts are alleged in the claim filed with the City.

Factual circumstances set forth in a written claim must correspond with the facts alleged in the complaint. A complaint is subject to demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim. (*Fall River Joint Unified School District v. Superior Court* (1988) 206 Cal.App.3d 431; *Doe v. City of Murrieta* (2002) 102 Cal.App.4th 899.) Simply put, the facts giving rise to plaintiff's sixth cause of action for negligent hiring, supervision and retention were not fairly alleged in his claim.

DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

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ARMSTRONG, J.

We concur:

GRIGNON, Acting P.J.

MOSK, J.